No. 86-998

IN THE

Supreme Court of the United States

October Term, 1986

JAPAN AIR LINES COMPANY, LTD.
and
SWISSAIR, SWISS AIR TRANSPORT
COMPANY, LTD.,
Petitioners,

v.

ELIZABETH HANFORD DOLE,
Secretary of Transportation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Was the Civil Aeronautics Board required to apply the flow of commerce doctrine which looks to the essential character of the transportation and the intent of the shipper, as established by this Court in *Texas & N.O.R.R. v. Sabine Tram Co.*, 227 U.S. 111 (1913), *Baltimore & O.S.W.R.R. v. Settle,* 260 U.S. 166 (1922) and related cases, in determining whether a Chicago-Seattle air cargo rate, which could only be used in conjunction with international transportation between Seattle and a point in a foreign country, was a rate applicable to foreign air transportation?

2. Did the Court of Appeals err in failing to require the C.A.B. to provide a reasoned analysis of its abandonment of this Court's flow of commerce doctrine which the agency had consistently applied in prior decisions?

LIST OF PARTIES

Petitioners in this case are:

Japan Air Lines Company, Ltd. and
Swissair, Swiss Air Transport Company, Ltd.

No parents, subsidiaries, or affiliated companies are publicly traded in the United States or otherwise owned in any measure by United States citizens.

Respondent in this case is:

Elizabeth Hanford Dole,
Secretary of Transportation

Additional parties:

The following were also parties or intervenors in the Court of Appeals:

Lufthansa German Airlines
Pan American World Airways, Inc.
Trans World Airlines, Inc.
Northwest Airlines, Inc.
British Airways, Plc.

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Japan Air Lines Company, Ltd. and Swissair, Swiss Air Transport Company, Ltd. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 19, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals appears in Appendix A to this Petition, and is reported at 801 F.2d 483.

Civil Aeronautics Board Order 84-8-55 appears in Appendix B and the Initial Decision of Administrative Law Judge John M. Vittone appears in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND TREATIES INVOLVED IN THE CASE

The statutory provisions involved in this case are Sections 101(24), 403(a) and 1102 of the Federal Aviation Act of 1958, as amended, codified at 49 U.S.C. §§1301(24), 1373(a) and 1502 (Appendix D). This case also involves the United States-Japan Air Transport Services Agreement, August 11, 1952, Art. 13, 4 U.S.T. 1948, 1954, T.I.A.S. No. 2854 (Appendix E) and the Annex to the United States-Switzerland Air Transport Services Interim Agreement of 1945, May 13, 1949, Section VII, 63 Stat. 2437, T.I.A.S. No. 1949 (Appendix F).

STATEMENT OF THE CASE

This case originated upon the filing of a complaint with the Civil Aeronautics Board ("C.A.B." or "the Board") on October 27, 1980 by the Petitioners and other foreign airlines against the "Visit U.S.A." or "VUSA" fares of certain U.S. air carriers.[1] On May 4, 1981, Japan Air Lines Com-

[1]In addition to the Petitioners, Lufthansa German Airlines, Philippine Airlines, Inc., and Singapore Airlines Limited were parties to the original complaint.

pany, Ltd. filed a complaint against the "Export Inland Contract Rates" of Northwest Airlines, Inc. ("Northwest"). The Export Inland Contract rates were rates, which although applicable to transportation of cargo between Chicago and Seattle, could only be used in conjunction with international transportation beyond Seattle to a point in Japan or other points in the Orient. The complaints alleged, *inter alia,* that the Export Inland Contract rates constituted rates in "foreign air transportation" which were subject to the tariff filing requirements of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §1301 *et seq.*, ("the Act") and relevant bilateral Civil Air Transport Agreements.[2]

On December 1, 1981, the C.A.B. instituted an investigation to determine, *inter alia,* whether the Export Inland Contract rates should be classified as domestic or international under the Act and the relevant bilateral agreements.

On June 3, 1983, after a full oral evidentiary hearing, the C.A.B.'s Administrative Law Judge ("ALJ") issued his Initial Decision (Appendix C). The ALJ analyzed the essential character of the Export Inland rates and found, *inter alia,* that ". . . there is little doubt that the Export-Inland Contract rates are rates in foreign air transportation." (Appendix C, page 146a.) Accordingly, he also found, pursuant to Section 403(a) of the Act, and the relevant bilateral Air Transport Agreements, that they were required to be filed in tariffs with the C.A.B. and with foreign aeronautical authorities.

After granting discretionary review of the Initial Decision, the C.A.B. issued Order 84-8-55, adopted on August

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[2]The C.A.B. decision relating to the VUSA fares was not appealed by Petitioners to the Court of Appeals and is not at issue.

10, 1985. In that order, the Board reversed the ALJ's finding that the Export Inland rates were rates in foreign air transportation. In determining that the rates were domestic the Board explicitly rejected the "flow of commerce" test and instead created a new "carrier-restricted" test which it applied in this case.

The term "carrier-restricted test" simply means that an export rate will be classified as either domestic or international depending *solely* on whether the carrier offering the rate explicitly *restricts* its availability only to those shippers who agree in advance to use the transportation services of the offering carrier over both the international as well as the domestic sector. If the rate is so restricted, it is an international rate. If it is not so restricted, it is irrelevant whether the same carrier actually and invariably provides the transportation over both the domestic sector and the international sector since in either case the C.A.B. would classify that rate as domestic. It is only when the offering carrier explicitly restricts the availability of the export rate to shipments which are carried on its own international services — and the rate is thus "carrier restricted" — that the rate is classified as an international rate.

Applying this test to Northwest's Export Inland rates, which were available only for international shipments from Chicago to Seattle which continued onward to points in the Far East, the C.A.B. classified these rates as domestic solely because Northwest did not explicitly restrict the availability of the rates to its own services. The C.A.B. classified these rates as domestic notwithstanding that (1) they were *not* available for purely domestic shipments originating in Chicago and terminating in Seattle nor for any other *solely* domestic transportation and (2) *all* of the shipments which used the Export Inland Con-

tract rates were transported by Northwest over both the Chicago/Seattle and the Seattle/Far East sectors *without any intervening break in the transportation.* (Appendix C, pages 146-150a.)

Pursuant to Section 1006(a) of the Act, 49 U.S.C. §1486(a), which confers jurisdiction to review orders of the Civil Aeronautics Board on the courts of appeals of the United States and the District of Columbia, Petitioners requested the United States Court of Appeals for the District of Columbia Circuit to review that part of the Board's decision which characterized the Export Inland Contract rate as a domestic rate. The Court of Appeals affirmed. (Appendix A.)

REASONS FOR GRANTING THE PETITION

This case raises the question of whether the C.A.B. erred in ignoring longstanding Supreme Court precedent by abandoning the essential character/flow of commerce doctrine, which it had previously applied in a uniform fashion, in determining that a Seattle-Chicago air cargo rate which could only be used in conjunction with transportation from Seattle to a point in a foreign country was not a rate applicable to foreign air transportation.[3] The C.A.B.'s refusal to apply the essential character/flow of commerce doctrine and its replacement by a newly created carrier-restricted test to determine the nature of a movement in transportation is inconsistent with the holdings of

[3]Less than five months following its decision in this case the C.A.B.'s regulatory responsibilities were transferred to the U.S. Department of Transportation pursuant to Section 1601 of the Airline Deregulation Act of 1978, 49 U.S.C. §1551. For purposes of simplicity, we will use the term C.A.B. as referring to both the Civil Aeronautics Board and the Department of Transportation.

this and numerous other courts. It is also inconsistent with the practice of the courts and the federal administrative agencies in differentiating between domestic and intrastate commerce on the one hand, and foreign and interstate commerce on the other hand. Accordingly, grant of this petition is required to (1) reaffirm the applicability and vitality of this Court's essential character/flow of commerce doctrine, (2) eliminate the conflicts between the various U.S. Appellate Circuits created by the Court of Appeals decision in this case and (3) prevent the C.A.B. from arbitrarily abandoning its longstanding policy of applying this Court's essential character doctrine without the required "reasoned analysis, indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ." *Greater Boston Television Corporation v. Federal Communications Commission,* 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971).

I. The C.A.B. Decision Is Contrary To and Inconsistent With Supreme Court Precedent and Federal Appellate Court Decisions

This case is the result of the C.A.B. reversal of its ALJ's Initial Decision which found that the Export Inland Contract rates established by Northwest constituted cargo rates in foreign air transportation within the meaning of Section 101(24) of the Act. Section 101(24) defines foreign air transportation as

> the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between . . . a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Pursuant to Section 403(a) of the Act, 49 U.S.C. §1373(a) all foreign and U.S. carriers, including the Petitioners and Northwest, are required to file tariffs with the C.A.B. for all cargo rates in foreign air transportation. In addition, the bilateral agreements governing foreign air transportation require that all fares and rates for transportation between the United States and the applicable foreign country be filed with each nation's aeronautical authority.[4] In this connection, Section 1102 of the Act, 49 U.S.C. §1502, obligates the C.A.B. to act consistently with "any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries . . . ." (Appendix D, pages 159a-160a.)

It is axiomatic that "the essential character of the commerce" is the decisive test in resolving the status of a particular movement, *Texas & N.O.R.R. v. Sabine Tram Co.*, 227 U.S. 111, 126 (1913), and that the shipper's intent determines the essential character of the commerce. *Baltimore & O.S.W.R.R. v. Settle,* 260 U.S. 166, 170-171 (1922). *Accord United States v. Erie R.R.,* 280 U.S. 98 (1929) (rail transportation of wood pulp from port through which imported to point in same state held part of foreign commerce); and *United States v. Capital Transit Co.*. 325 U.S. 357 (1945) (bus transportation between two points within the District of Columbia held to be within in-

[4]*E.g.*, Annex to the United States-Switzerland Air Transport Services Interim Agreement of 1945, May 13, 1949, Section VII, 63 Stat. 2437, T.I.A.S. No. 1929; United States-Japan Air Transport Services Agreement of 1952, Art. 13, 4 U.S.T. 1948, 1954, T.I.A.S. No. 2854 (Appendices E and F).

terstate commerce to the extent it involved passengers whose journey originated or ended in Virginia).[5]

The ALJ, who was the initial C.A.B. decisionmaker, found that the Export Inland Contract rates constituted rates in foreign air transportation which must be filed with the United States and relevant foreign governments. In arriving at that conclusion, the ALJ relied on the traditional essential character analysis, stating that:

- ". . . the intent and effect of the contract rates was to enhance Northwest's competitive position in an international market." (Appendix C, page 147a.)
- "The contracts state that the 'rates are applicable *only to international shipments* which terminate in . . . Hong Kong, Japan, South Korea, Philippines, or Taiwan.' " (*Id.;* emphasis added by ALJ.)
- "The contract also requires that the domestic air bill covering the movement from Chicago to Seattle include a signed endorsement that the

[5]*See also* Illinois Central R.R. v. De Fuentes, 236 U.S. 157, 163 (1915) (when "interstate character has been acquired it continues, at least, until the load reaches the point where the parties originally intended that the movement should finally end."); *Compare* McElroy v. United States, 455 U.S. 642, 652-653, 658 (1982) (in drafting a statute prohibiting the interstate transportation of forged securities, Congress intended the term "interstate commerce" to be as broad in scope as the Court's longstanding decisions holding that such "commerce begins well before state lines are crossed, and ends only when movement of the item in question has ceased in the destination State."); *compare also* United States v. Maddox, 394 F.2d 297, 299-300 (4th Cir. 1968) (removal of stolen sugar to a warehouse was a mere interruption in the flow of commerce which did not destroy interstate character of the shipment for purposes of establishing federal criminal jurisdiction).

> shipment is a 'true international shipment beyond the [Seattle] gateway.' " *(Id.)*

- "[A]n internal Northwest document . . . states that the rate is to be used for 'transpacific rate construction purposes.' " (*Id.*)
- "Northwest's witness conceded that the rate was instituted to meet competition in the movement of international cargo from Chicago to the Orient." (*Id.* at page 148a.)

Significantly, the ALJ's reliance on the essential character of the rates is consistent with the C.A.B.'s directive to the parties to introduce:

> comprehensive factual evidence as to whether these fares as actually applied are typically part of a continuous integrated international journey originating and terminating in a foreign country. . . .

(Appendix C, page 109a, *quoting from* C.A.B. Order 81-11-182 at 8.) This directive evidences that the C.A.B. at least when instituting its investigation, intended to conform to the essential character/flow of commerce doctrine to determine the status of the Export Inland rates. Nonetheless, it summarily dismissed its own fact finder's determination which was consistent with that doctrine. Instead, it created an entirely new "carrier-restricted" test, effectively reversing its own precedents as well as those established by this Court and consistently applied by other federal courts and federal administrative agencies.

Other than in the instant case, the C.A.B. has adhered to judicial precedent and repeatedly looked to the essential character of the transportation provided and the intent of the passenger or shipper in differentiating between domestic and foreign air transportation. As early as 1941 it cited

Settle, supra, and other essential character/flow of commerce cases and stated that:

> These cases furnish a *controlling* analogy for determining whether the carriage here involved is "foreign air transportation" within the meaning of section 1(21).[6]

Canadian Colonial Airways, Inc. - Investigation, 2 C.A.B. 752, 754 (1941) (emphasis added) (transportation through U.S. airspace but between two foreign points did not constitute foreign air transportation notwithstanding an overnight stop at Jacksonville, Florida).

The C.A.B. reaffirmed its reliance on the essential character/flow of commerce doctrine in *Resort Airlines Miami Stopover Investigation,* 19 C.A.B. 1,9 (1954) (holding that the Miami to New York segment of a package tour involving travel beyond Miami to points in the Caribbean constituted foreign air transportation and explaining that it had undertaken an inquiry corresponding to that made in *Settle, supra,* where the "basic question posed by the court was the 'essential nature of the movement. . .' "); in *Air Freight Forwarders, Revocations,* 65 C.A.B. 1605, 1608 (1974) ("The Board has previously held that whether a shipment is moving in domestic or international air transportation is determined by its ultimate destination, and that a stopover which is merely an incidental part of a whole trip, does not affect this determination."); in *Application of Air Tungaru-UTA,* 90 C.A.B. 606 (1981) (service between two foreign points which would not otherwise be subject to U.S. jurisdiction held to be in foreign air

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[6]Section 1(21) of the Civil Aeronautics Act of 1938 (52 Stat. 973, 979) was recodified as, and is identical to, Section 101(24) of the Federal Aviation Act of 1958, as amended.

transportation and accordingly subject to U.S. jurisdiction because it constituted one segment of through service from a U.S. point to a foreign point); and in *Air Florida-BIA Wet Lease*, 102 C.A.B. 730 (1983) (". . . it is clear that the flights operated by [British Island Airways] will be part of a continuous operation by Air Florida between the United States and Amsterdam, Brussels, Dusseldorf, and Frankfurt. Such service is clearly in foreign air transportation and therefore subject to our jurisdiction and governed by our regulations." (Footnote *citing Canadian Colonial Airways, Inc., supra,* omitted.))[7]

Application of the essential character/flow of commerce doctrine extends beyond the field of aviation and has been followed in other regulatory settings. The Interstate Commerce Commission has *uniformly* looked to the essential character of the integrated movement to determine whether any individual segment is in foreign or interstate commerce. *See, e.g., Iron and Steel Articles from Wilmington, North Carolina to Points in North Carolina via General Motor Lines, Inc.*, 323 I.C.C. 740, 742, 744 (1965), *aff'd sub nom. North Carolina Utilities Commission v. United States,* 253 F. Supp. 930 (E.D.N.C. 1966) (*citing Settle, Erie* and *Sabine, supra,* for precept that "the essential character of the commerce determines whether a shipment is interstate (foreign) or intrastate in nature"; *Southern States Cooperative v. Baltimore &*

[7]*See also* Eastern Air Lines, Inc., Enforcement Proceeding, 40 C.A.B. 745, 747 (1964) (where although the C.A.B. ultimately determined to dismiss the case and resolve the contested issues in another proceeding, it cited, *inter alia, Settle, supra,* and noted that "[a]s a general rule, the destination which was intended by the passenger when he begins the journey and which was known to the carrier and for which he purchased a ticket determines the character of the trip.").

O.R.R., 323 I.C.C. 400, 403-404 (1964) (inland shipments of imported merchandise were determined to be continuations of foreign commerce to which "import rate" tariffs applied, not as separate and distinct movements in domestic commerce, because the shipper's "intention . . . was to reship all inbound traffic in continuous movement."); *Armstrong World Industries, Inc.*, No. MC-C-10963, slip op. at 6-7 (ICC April 3, 1986) (*citing Settle* and *Sabine, supra,* for the propositions that "[i]t is well settled that characterization of transportation between two points in a State as interstate or intrastate in nature depends on the 'essential character' of the shipment" and that "[c]rucial to a determination of the essential character of a shipment is the shipper's fixed and persisting intent at the time of the shipment.").

The essential character test has also been used in tariff and rate situations by the Federal Maritime Commission and its predecessor agencies ("F.M.C."). For example, in *Intercoastal Investigation,* 1 U.S.M.C. 400, 440 (SBB 1935), the U.S. Shipping Board Bureau cited *Settle, supra,* and relied on the shipper's "original and continuing intention" to engage in intercoastal commerce by way of the Panama Canal for purposes of applying the tariff filing requirements of the Intercoastal Shipping Act. Similarly, the F.M.C. has held that carriers operating between two foreign ports and transshipping their cargo to United States bound carriers are part of the "continuous line" of carriage to the United States. Thus, the carriers were held to be common carriers engaged in foreign commerce under the Shipping Act of 1916. *Restrictions on Transshipment at the Canal Zone,* 2 U.S.M.C. 675, 679 (1943); *Agreement Between South Thailand and the United States,* Initial Decision, 10 F.M.C. 201, 209, *adopted,* 10 F.M.C. 199 (1966).

More recently, the F.M.C. amended its regulations to clarify that "[a]n agreement which involves movement of cargo in a domestic offshore trade as part of a through movement of cargo via transshipment involving the foreign commerce of the United States *shall be considered to be in the foreign commerce of the United States . . . .*" (46 C.F.R. §572.104(ff); emphasis supplied). Such agreements are therefore subject to the agreement and tariff filing requirements of the Shipping Act of 1984, which regulates common carriage by water in foreign commerce. 46 U.S.C. §§1702(6), 1703, 1707; *See* 50 Fed. Reg. 6944 (Feb. 19, 1985).[8]

Notwithstanding its own precedent dating back to at least 1941, the uniform practice of other federal administrative agencies, and the precedents of this and other federal courts, the C.A.B. arbitrarily abandoned the essential character/flow of commerce test in evaluating Northwest's Export Inland rate, and instead utilized a newly created "carrier-restricted test." The denial of this Petition would effectively sanction the new test and would undermine the existing, long established regulatory scheme based on the holdings in *Sabine, Settle,* and *Erie,*

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[8]The essential character/flow of commerce test has also been applied in the areas of natural gas pipeline regulation, *See* Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 503-504 (1942) (the "point at which the title and custody of the gas passes to the purchaser without arresting its movement to the intended destination does not affect the essential interstate nature of the business."); and the regulation of food and drugs, *see* United States v. Cassaro, Inc., 443 F.2d 153, 156 (5th Cir. 1971) (the Federal Food, Drug and Cosmetic Act contains "an overall scheme designed to regulate the interstate flow of goods 'from the moment of their introduction into interstate commerce' until 'the moment of their delivery to the ultimate consumer,' " *citing* United States v. Sullivan, 332 U.S. 689 (1948)).

supra, which currently pervades all aspects of commerce and transportation. Petitioners respectfully submit that the inconsistency of the new standard with the long established holdings of this Court justifies grant of this Petition.

II. The Court of Appeals Erred in Failing to Apply the Requisite Degree of Scrutiny to the C.A.B. Decision Substituting the Newly Created Carrier-Restricted Test for the Long Established Essential Character/Flow of Commerce Test

In reviewing the C.A.B. decision at issue here, the Court of Appeals failed to apply this Court's repeated holdings that there is a presumption against unexplained changes in agency policy. As stated in *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Company,* 463 U.S. 29, 42 (1983):

> an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

The Court of Appeals also ignored its holding that:

> an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . .

Greater Boston Television, supra, 444 F.2d at 852. Moreover, it failed to follow its admonition that agency deviation from established precedent necessitates a "heightened" scrutiny on review to ensure that the agency articulated permissible reasons for the change and that the new position is consistent with the law. *NAACP v. FCC,* 682 F.2d 993, 998 (D.C. Cir. 1982).

The C.A.B.'s abrupt abandonment of this Court's long established essential character/flow of commerce doctrine imposed a rigorous scrutiny requirement upon the Court of Appeals. It did not meet that requirement. To the contrary, the Court of Appeals utterly failed to investigate the nature and function of the Export Inland rate. Had it done so, it would have discovered that the C.A.B.'s freshly minted "test" has no rational basis. It is on its face unreasonable to classify an accurately labeled "Export" rate, which is available only to traffic destined to Japan and other points in the Far East beyond Seattle, but which is *not* available to purely domestic transportation, as a domestic rate. The fact that an export rate is not "carrier-restricted" does not affect its essentially foreign character when it can only be used in conjunction with international transportation. Petitioners respectfully submit that this Court should not sanction a "test" which leads to the arbitrary and illogical result that an export rate not available for domestic transportation is nonetheless classified as domestic.

Rather than remanding the decision to the C.A.B. for the "reasoned analysis" required by this Court, the Court of Appeals seized on the agency's self-serving statement that it had never unequivocally stated that the flow of commerce test is the *sole* test for determining whether air transportation is foreign. (Appendix A, page 9a.) As used by the C.A.B., that statement is apparently intended to signify that the agency has never unequivocally stated that all air transportation which arguably can be said to originate or terminate in a foreign country is automatically foreign air transportation. (Appendix B, page 56a.) The Court of Appeals apparently accepted the C.A.B.'s characterization of Petitioners' argument as advocating an extreme "strict" flow of commerce test which would mandate

that any nexus, no matter how remote, to foreign commerce is sufficient to categorize a movement as foreign air transportation. This is a gross mischaracterization of Petitioners' position. Petitioners argue only that the C.A.B. must adhere to this Court's repeatedly stated requirement that an agency look to the essential character of the transportation and to the intent of the shippers in determining whether the transportation is foreign or domestic.

The Court of Appeals' statement that "the CAB has never stated that the 'flow of commerce' test is the *sole* test for determining whether air transportation is foreign" (Appendix A, page 9a) is correct only insofar as it refers to the so-called "strict" flow of commerce test discussed above. Had the Court of Appeals more carefully examined C.A.B. precedent, it would have found that it manifests a consistent adherence to the essential character and shipper's intent criteria which underlie this Court's flow of commerce doctrine.

Thus, although *Canadian Colonial Airways, Inc. - Investigation,* 2 C.A.B. 752 (1941) does not state that the "flow of commerce" test is the *only* applicable test, it does, as the Court of Appeals notes, cite to *Settle, Sabine,* and other Supreme Court cases applying that test. Moreover, the C.A.B. clearly looked to the "essential character" of the Montreal-Nassau transportation at issue in that case in determining that an "incidental" stopover at Jacksonville, Florida did not transform what would otherwise be foreign air transportation into domestic air transportation.

Similarly, the C.A.B.'s failure to state that the "flow of commerce" test is the *only* applicable test in *Resort Airlines Miami Stopover Investigation,* 19 C.A.B. 1, 8 (1954) is irrelevant where it cited *Settle, supra,* as well as other

essential character/flow of commerce cases, and looked to the essential character of the transportation in framing the issue to be whether the stopover was "the principal or dominant part of the tour" such that "it seems apparent that the *essential nature* of the tour would be altered. . . ." (Emphasis added.)

Adherence to this Court's essential character/flow of commerce doctrine is also manifest in *Eastern Air Lines, Inc., Enforcement Proceeding,* 40 C.A.B. 745, 747 (1964). In that case, the agency cited *Settle, supra,* and said "[a]s a general rule, the destination which was intended by the passenger when he begins the journey and which was known to the carrier and for which he purchased a ticket determines the character of the trip."

Petitioners also disagree with the acceptance by the Court of Appeals of the C.A.B.'s assertion that the Board's *Tariff Flexibility Rulemaking,* 46 Fed. Reg. 46,787 (1981), is precedent for use of an alternative test. (Appendix A, pages 11a-12a.) This is patently incorrect. The *Tariff Flexibility Rulemaking* cannot reasonably be cited for anything other than continued C.A.B. reliance on the essential character/flow of commerce doctrine established by this Court. In rejecting the argument that any domestic fares and rates which could be combined with foreign fares or rates were actually fares in foreign transportation subject to tariff filing requirements, the C.A.B. obviously applied the essential character/flow of commerce test. The fares and rates in question were primarily domestic in nature and only incidentally combinable with fares and rates in foreign air transportation. The "essential character" of the fares and rates was domestic.[9] Accor-

[9]Significantly, the C.A.B. explicitly stated that the Export Inland rate is "distinguishable from the typical 'combinable' domestic fares which were the focus of the *Tariff Flexibility Rulemaking,* in that they

dingly, this rulemaking affirms rather than negates previous C.A.B. reliance on the essential character/flow of commerce doctrine.

CONCLUSION

The C.A.B.'s failure to apply the essential character/flow of commerce doctrine in this case was an unwarranted departure from longstanding federal court precedent and the agency's own practice of applying the essential character/flow of commerce doctrine to distinguish between movements in foreign and domestic air transportation. Moreover, the agency failed to provide a reasonable analysis supporting its abandonment of prior practice as required by this Court. Accordingly, Petitioners request grant of the foregoing petition for a writ of certiorari.

Respectfully submitted,

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Dated: December 18, 1986

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are not 'generally and independently available for purchase by domestic passengers without reference to prior or subsequent travel on international sectors.' " (Appendix B, page 53a.)